undertakes (and he emphasised this last word) to refund. The landlord does not pay there and then. This is an issue. Clause 6 of the agreement requires the Court's interpretation. The action is premature. Defendant has a counter-claim, and unconditional leave must be given.

Plaintiff's Counsel argued that the landlord undertook to refund the money when he gave notice, not when he vacated the premises.

The learned Registrar held that construction of the agreement lies with the Judge. Plaintiff's Counsel contended that defendant has not a *bona fide* sustainable defence and asked that $4,720 be deposited within ten days.

Defendant's Counsel replied that there is a *bona fide* case to go before the Court.

The Senior Assistant Registrar stated that he was of the considered opinion that the defence is *prima facie* sustainable. He did not feel any reasonable doubt as to its good faith, and he granted unconditional leave to defend.

Section 460 of the Civil Procedure Code states :—

(1) The Court shall, upon application by the defendant give leave to defend the suit, upon the defendant paying into Court the sum mentioned in the summons or upon evidence satisfactory to the Court, which discloses a defence or such facts as the Court may deem sufficient to support the application, and on such terms as to security, framing and recording issues, or otherwise, as the Court thinks fit.

(2) The defendant shall not be required to pay into Court the sum mentioned in the summons or to give security therefor unless the Court thinks his defence not to be *prima facie* sustainable or if there is reasonable doubt as to its good faith.

The Senior Assistant Registrar, after hearing both sides, was of the considered opinion that the defence was *prima facie* sustainable and he did not feel any reasonable doubt as to its good faith. He grounded his decision on the terms of section 460(2) of the Civil Procedure Code. Having arrived at his con clusions, he had no authority to require payment into Court or the giving of security and he granted unconditional leave.

At the hearing of the appeal plaintiff's Counsel argued that the Registrar was wrong to hold there was any defence or that there was good faith. He contended that the Registrar was the Judge as to the construction of the agreement. Defendant's Counsel stated that the object of the deposit was to secure the terms of the tenancy. On completion of the tenancy the deposit was to be refunded. There was three months notice of termination. The tenant cannot have both the tenancy and the deposit. What would happen about damage done to the premises? The Registrar was right. There is a case to go for trial. The plaintiff may get his deposit and then not vacate. This is not reasonable. There is good faith on the part of the defendant. There is a dispute as to the amount which would be due to the plaintiff — the question of $50 per month in respect of upstairs.

Having considered the case for plaintiff/appellant and defendant/respondent respectively, and reminding myself that the defendant must not be required to pay into Court or give security unless the Court thinks his defence not to be *prima facie* (I emphasise *prima facie*) sustainable or feels reasonable doubt as to its good faith, I see no sufficient reason for interfering with the finding and order of the learned Senior Assistant Registrar.

I accordingly dismiss the Appeal with costs to defendant.

Appeal dismissed.

TEJA SINGH v. K. PERIASAMY

[O. C. J. (Smith J.) August 19, 1957]

[Seremban — Originating Summons No. 11 of 1957]

Moneylending — Moneylenders Ordinance, 1951. s. 16 — Delivery of copy of note or memorandum of loan to borrower — Bills of Sale Enactment (Cap. 57).

In this originating summons a registered moneylender applied for leave to realise his security under a registered Bill of Sale granted to him by the respondent. It appeared in evidence that the money was passed before the copy of the Bill of Sale was handed over to the lender.

Held: a moneylender must comply with section 16 of the Moneylenders Ordinance, 1951, even when he is lending money on the security of a properly registered Bill of Sale and, as in this case, the money had been lent before a copy of the Bill of Sale was handed over to the lender. the security given by the lender was unenforceable.

Case referred to :—

(1) *Sadhu Singh v. Sellathurai* (1955) M.L.J. 119.

ORIGINATING SUMMONS.

S. D. K. Peddie for the applicant.

Respondent in person.

Smith J. : — In this originating summons a registered moneylender seeks leave to realise his security under a registered Bill of Sale granted to him by the respondent.

Three issues of fact arose. The first was whether or not the personal chattels referred to in the Bill of Sale were in fact immovables. The scheduled property was a house which at the parties' request I visited and satisfied myself was a movable structure and not permanently fixed to the site.

The second issue was whether greater amounts than those credited by the applicant had been paid by the respondent. I find in favour of the applicant. I am satisfied that the respondent is sufficiently educated, intelligent and experienced to succeed in obtaining a receipt whenever he requires one. I do not believe him when he says that the applicant refused to give him receipts and that he continued to pay him despite these refusals.

The third issue of fact was whether the applicant gave the respondent a copy of the Bill of Sale. I find that he did so in the manner which he described in evidence and to which I shall be referring later. I regard the applicant as a credible witness: I do not so regard the respondent. Generally, therefore, I accept all facts as given in evidence by the applicant.

Before I can give the applicant leave to realise his security I am of opinion that he must satisfy me that he has fully complied with section 16 of the Moneylenders Ordinance, 1951. *Stone and Meston's* "Law relating to Moneylenders", 3rd edition, page 101, has this comment on section 6 of the United Kingdom Moneylenders Act, 1927, which is generally *in pari materia* with our section 16:—

Burden of Proof.

"As section 6 renders it necessary that both the borrower and the money-lender should do certain things, it is material to inquire into the question of the burden of proof in regard to such things. It is submitted that there is no presumption that the requirements of section 6 have been fulfilled; in every case it must be proved by the person seeking to enforce the contract (who is almost invariably the money-lender in the first instance) that the requirements of the above section have been fulfilled."

In this case, in favour of the respondent who was unrepresented I raised the point whether section 16(1) had been fully complied with by the applicant because it appears that the money passed before a copy of the "note or memorandum" was handed to the respondent-borrower. I remark in passing that even if the respondent had been represented, it would still have been the duty of the Court to inquire whether section 16(1) had been fully complied with since such compliance alone can give the Court jurisdiction to enforce the security.

In evidence, questioned by myself, the applicant said as follows:—

"When I lent $1,000 I gave a copy of Bill of Sale to Mr. Periasamy. When I handed him $1,000 he asked for a copy of Bill of Sale which I gave him then. It was an exact copy of original and signed by me. I gave him money in the Court. The copy was given him after I had handed the money. I handed him no other document in connection with the loan."

The only deduction which I can make from that statement is that the money passed before the copy of the Bill of Sale was handed over. The registration of the Bill of Sale took place before the Magistrate. There is no requirement of law (F.M.S. Cap. 57) that, when money is lent on the security of a Bill of Sale, the money shall pass in the presence of the Magistrate. The loan is still recoverable if the Bill of Sale is not registered but the security is unenforceable. There can be no argument therefore that when the money was handed over it was not yet lent because all steps in relation to the registration of the bill of sale had not yet been completed. The copy of the note or memorandum was therefore handed over *after* the money was lent.

To the argument that the security was therefore unenforceable the applicant raised two arguments. The first was that no sanction is attached to failure to hand over the copy note or memorandum before the money is lent. It was submitted that the only sanction is that which appears at the end of the sub-section and that unenforceability only arises when it has been proved that the note or memorandum was not signed before the money was lent (see the last few lines of the sub-section). I cannot agree with this view. The provisions appear to me to be cumulative and that the loan or security will be unenforceable unless:—

(i) a note or memorandum has been made and signed personally by the borrower before the money is lent or security given;

(ii) a copy thereof is delivered to the borrower or his agent before the money is lent; and

(iii) the note contains the particulars required by sub-section (3), (see *Stone and Meston op. cit.* pages 98 - 99).

The next argument of the applicant was that if the applicant had complied with the Bills of Sale Enactment there was no need to comply with the Moneylenders Ordinance. Compliance with the Bills of Sale Enactment prevented exploitation of the borrower which was the object of the Moneylenders Ordinance. If this argument be valid unlicensed moneylenders may carry on business by lending their money on the security of bills of sale. The argument

was that the Bills of Sale Enactment provides for the special case of bills of sale, and therefore the Moneylenders Ordinance, a general statute, must be read as silently excluding from its operation Bills of Sale. I cannot agree. It appears to be perfectly possible for the two written laws to be operated in respect of the same transaction. The protection afforded by the Bills of Sale Enactment (see Cap. 57, section 8) appears to me to be that there shall be certainty as to what is the security. Section 16 of the Moneylenders Ordinance protects the borrower by ensuring that he is in possession of the terms of his contract of repayment before he actually receives the loan. There is nothing repugnant between these written laws. I consider that a moneylender must comply with section 16(1) of the Moneylenders Ordinance even when he is lending money on the security of a properly registered bill of sale. I can see nothing in such compliance which is not agreeable to justice and reason.

I do not consider that the applicant complied fully with section 16(1) of the Moneylenders Ordinance and that consequently the security given by the respondent is unenforceable.

I find myself in the same situation as the Court in the case of *Sadhu Singh v. Sellathurai*[1], at page 119 penultimate paragraph in that I have sympathy for the applicant but feel that I cannot fly in the face of the Moneylenders Ordinance.

The application is dismissed.

Since much time in this case has been taken up in deciding issues of fact which I have found in favour of the applicant and the arguing of points raised on behalf of the respondent by the Court, I consider that this is a proper case in which I should make no award of costs.

Application dismissed. No order as to costs.

Application dismissed.

Solicitors: *Bannon & Bailey.*

CHONG HOOI v. TEE NGI (f)

[A. C. J. (Sutherland J.) September 28, 1957]

[K. L. — Civil Appeal No. 14 of 1957]

Husband and Wife — Married Women and Children (Maintenance) Ordinance, 1950 — Offer by husband to maintain his wife on condition of her living with him — Offer made in Court — Duty of Court to decide whether offer is genuine and if so whether wife had sufficient reason to refuse the offer.

In this case the respondent claimed maintenance from the appellant. At the hearing in Court the husband offered to maintain his wife on condition that she lived with him. The Magistrate made no finding as to whether the offer was genuine but said that he was satisfied that the respondent did not refuse to live with the appellant.

Held: where an offer is made by the husband to maintain his wife on condition of her living with him, the Court should have considered whether the offer was genuine and, if the wife refused it, whether she had sufficient reason for refusing to live with her husband.

CIVIL APPEAL.

P. P. Nair for the appellant.

Eugene Lye for the respondent.

Sutherland J. : — The appellant appeals against the decision of the learned Magistrate that the appellant pay the respondent as from 1st January, 1956, the sum of $80 per month for maintenance of the applicant and the daughter of the appellant with the respondent.

Mr. P. P. Nair, who appeared for the appellant, stated that the appellant was not pressing the question of alleged adultery.

He did however urge the point as to respondent's alleged refusal to live with appellant without sufficient cause. He referred to the Married Women and Children (Maintenance) Ordinance 1950, section 5 sub-section (2), and, as the parties to the appeal were at issue in respect of section 5, I propose to quote it

"5. (1) If any person, against whom an order has been applied for or made for the maintenance of his wife, offers to maintain his wife on condition of her living with him, and his wife refuses to do so, the Court shall consider any grounds of refusal stated by such wife, and may make or enforce the order aforesaid, notwithstanding such offer, if it is satisfied that such person is living in adultery or for any other reason it is just so to do.

(2) No wife shall be entitled to receive an allowance from her husband under the provisions of this Ordinance if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband."

Mr. Nair conceded that the learned Magistrate found that the wife did not refuse to live with the husband, but he urged that in arriving at this finding the Magistrate had overlooked the evidence. The husband offered to take her back. The Magistrate did not put the offer to the applicant and consider her reasons for refusing to live with applicant. In any event $80 out of $154.10 per month is too much.

Mr. Lye, for the respondent, stated that nowhere in the evidence of the husband has he made an outright offer to live with his wife. On oath the husband made an allegation that his wife had committed adultery. The Magistrate did consider the offer, and is justified in his finding as to it. The wife